United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24024

MADELINE WILKINSON,

Plaintiff-Appellant,

-vs.-

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX OF APPELLEE, UNITED STATES OF AMERICA

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellee,
United States of America.

MIRIAM R. GOLDMAN,
Assistant United States Attorney,
Of Counsel.

Complaint

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

Plaintiff Demands Trial by Jury

No. 101–101

MADELINE WILKINSON,

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant.

The above-named Plaintiff, by her attorney, Benjamin E. Kantrowitz, for a Complaint herein, respectfully alleges, on information and belief:

1) This action arises under the Servicemen's Indemnity Act of 1951, 38 U. S. C. A. §§ 851, et. seq., and 38 U. S. C. A. §§ 445, 445C and 551 and is based upon Servicemen's Indemnity Insurance on the life of Franklin J. Wilkinson, now deceased, payable by the Defendant.

2) Plaintiff resides at 481 Fort Washington Ave., New York, N. Y.

3) Heretofore and on or about the 3rd day of August, 1951 the said Franklin J. Wilkinson was inducted into the

Armed Forces of the United States of America and he was killed in action in Korea on or about July 14, 1953 at which time he was still a member of said Armed Forces, more specifically, of the United States Army, and by reason of said death in action said Servicemen's Indemnity insurance matured and became payable to the beneficiary of said insurance in the amount of $10,000.00.

4) The Plaintiff is the widow of said Franklin J. Wilkinson, and the Plaintiff and the said Franklin J. Wilkinson were married on or about August 30, 1952.

5) Plaintiff is the sole beneficiary of said Servicemen's Indemnity insurance and was designated as the sole beneficiary of said Servicemen's Indemnity insurance and as such beneficiary is entitled to receive the sum of $10,000.00 in accordance with said Servicemen's Indemnity Act of 1951.

6) Prior to the commencement of the within action the Plaintiff made and filed with the Veterans Administration a claim for benefits under said Servicemen's Indemnity Insurance but such claim was disallowed by said Veterans Administration, and upon appeal, was disallowed by the Board of Veterans Appeals on July 1, 1954.

7) A disagreement exists between the Plaintiff and the said Veterans Administration as to who is the beneficiary to receive payment of such Servicemen's Indemnity insurance.

8). Plaintiff has been obliged to employ an Attorney, Benjamin E. Kantrowitz, to institute and prosecute the within action to a final determination, and such Attorney is entitled to a reasonable fee for his services.

WHEREFORE, Plaintiff prays that a copy of this Complaint be served on the Defendant and for Judgment as follows:

I) *(sic)* Declaring the Plaintiff to be entitled to the full benefits of said Servicemen's Indemnity insurance and to all future benefits and payments thereunder all in the amount of $10,000.00.

II) Providing for a reasonable fee to be paid to the Attorney for the Plaintiff as compensation for his services in the within action.

III) Granting such other and further relief in the premises as may be just,

Dated: New York, N. Y.
June 3, 1955.

BENJAMIN E. KANTROWITZ
Attorney for Plaintiff
Office and P. O. Address
4879 Broadway
New York 34, N. Y.

No. 542

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957.

THE UNITED STATES, *Petitioner*

v.

MADELINE WILKINSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

THE UNITED STATES, *Petitioner*

v.

MALELINE WILKINSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above case on April 1, 1957.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 1) is not reported. The opinion of the Court of Appeals (App. B, *infra*, pp. 23-26) is reported at 242 F. 2d 735.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1957 (R. 16). A timely petition for rehearing was denied on May 1, 1957 (R. 21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal district courts have jurisdiction to entertain suits to compel the United States to pay the death gratuity provided by the Servicemen's Indemnity Act of 1951.

STATUTES INVOLVED

P. L. 23, 82d Cong., 1st Sess. (65 Stat. 33), Part I of which constituted the Servicemen's Indemnity Act of 1951 (65 Stat. 33, 38 U.S.C. 851-858)[1] is set forth in Appendix A, *infra*, pp. 17-22.

Section 11 of the Act of October 17, 1940 (54 Stat. 1197, 38 U.S.C. 11a-2), expressly denying jurisdiction to the courts to review Veterans Administration determinations, is set forth in the text of the argument, *infra*, p. 8.

STATEMENT

This is an action against the United States to recover the $10,000 death gratuity provided by the Servicemen's Indemnity Act of 1951 for survivors of certain servicemen who die while on active duty.

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[1] The Act was repealed, as of January 1, 1957, only with respect to all servicemen's deaths occurring thereafter. See Servicemen's and Veterans' Survivors Benefits Act, P. L. 881, 84th Cong., 2d Sess., 70 Stat. 886, 38 U.S.C. (Supp. IV) 1116(e). For this reason, the question presented by the instant case, as we show below, is still of considerable importance. See p. 15.

The stated purpose of the 1951 Act, as set forth in its preamble, is to "authorize the payment by the Administrator of Veterans' Affairs of a gratuitous indemnity to survivors of members of the Armed Forces who die in active service, * * *." *Infra*, p. 17. The Act accordingly provided[2] that "on and after June 27, 1950, any person in the active service of the Army, Navy, Air Force * * * shall be automatically insured by the United States, without cost to such person, against death in such service in the principal amount of $10,000 * * *." Section 2, *infra*, pp 17-18.

The Act contains no express authority for suit against the United States, and does not provide for any judicial review of Veterans Administration decisions under the Act.

Respondent is the widow of Franklin J. Wilkinson, whom she married in August, 1952, one year after his induction into the Army (R. 2-3). Wilkinson was killed in Korea on July 14, 1953 (R. 3). Shortly after his death, she filed with the Veterans Administration a claim for the $10,000 death gratuity under the 1951 Act. The claim was disallowed by the Veterans Administration and, upon appeal, by the Board of Veterans Appeals.[3] This suit was then filed in the

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[2] See preceding footnote.

[3] At the time of his induction into service, when he was unmarried, the serviceman had apparently named his mother as beneficiary of the death gratuity. The respondent widow's claim was rejected by the Veterans Administration, according to her brief below, "largely on the basis that no formal Veterans Administration form changing beneficiary to the widow had been located. It is to be noted that there is no question so far as the government is concerned that the $10,000 is payable, the only issue being who is the proper beneficiary." Plaintiff-Appellant's Brief, p. 2.

United States District Court for the Southern District of New York in order to upset the administrative disallowance and to recover the gratuity on the ground that respondent was "the sole beneficiary" (R. 3). The United States moved to dismiss on the ground that the court lacked jurisdiction because the United States had not consented to suit on such a claim. The court sustained the motion, and dismissed the complaint. The Court of Appeals reversed, holding that the courts do have jurisdiction to entertain such suits.

REASONS FOR GRANTING THE WRIT

The holding below, which we believe to be incorrect and a departure from the settled principle of federal immunity from suit in the absence of congressional consent, is in square conflict with decisions of four other circuit courts of appeals. Resolution of the conflict by this Court is essential to avoid the unjust result that the rights of claimants under the 1951 Act will vary depending on the circuit in which suit is brought.

1. *The Conflict in Decisions.* In holding that there is jurisdiction in the district courts to review administrative denials of death gratuities under the Servicemen's Indemnity Act of 1951, the court below is in direct conflict with decisions of the First, Fifth, Sixth and Eighth Circuits. *Acker* v. *United States*, 226 F. 2d 575 (C. A. 5), certiorari denied, 350 U. S. 1008; *Ford* v. *United States*, 230 F. 2d 533 (C. A. 5); *Cyrus* v. *United States*, 226 F. 2d 416 (C. A. 1); *Turner* v. *United States*, 237 F. 2d 700 (C. A. 8); *United States*

v. *Houston*, 216 F. 2d 440 (C. A. 6).[4] Similarly, the decision below conflicts with the decision of every district court which has considered the question, save one.[5]

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[4] Thus, in *Cyrus*, for example, Chief Judge Magruder, referring directly to the Servicemen's Indemnity Act of 1951, stated (226 F. 2d 416, 418):

> * * * Nowhere in the Act is the gratuitous indemnity thus provided for described as a "contract of insurance," nor did the Act contain any provision, such as was found in the National Service Life Insurance Act of 1940 and in the World War Veterans' Act of 1924, authorizing suits against the United States on claims for the gratuitous indemnity.
>
> Such being the state of the statute law, we think the district court was clearly right in entering judgment dismissing the present complaint for lack of jurisdiction, * * *.

And in *Houston*, the Court of Appeals for the Sixth Circuit declared (216 F. 2d 440):

> It is evident from a careful examination of the relevant statutes that unlike the National Service Life Insurance Act, 38 U.S.C.A. § 817, a district court is without jurisdiction to review an award made by the Administrator of Veterans' Affairs under the Servicemen's Indemnity Act of 1951, * * *.

[5] *Brewer* v. *United States*, 117 F. Supp. 842 (E. D. Tenn.); *Declet* v. *Veterans Administration*, 129 F. Supp. 566 (D. Puerto Rico); *McCoy* v. *United States* (No. 3548, E. D. Okla.); *Pugh* v. *United States* (No. 1687, E. D. Tex.); *Yurgensen* v. *Higley, Administrator of Veterans' Affairs and United States* (No. 420-54, D. N. J.); *Bishop* v. *United States* (No. 9076, W. D. Mo.); *Jones* v. *United States* (No. 18069, E. D. Pa); *Stout* v. *United States* (No. 55-C-36, S. D. Ind.); *Borette* v. *United States* (No. 4962, N. D. N. Y.); *MacLean* v. *United States* (No. 4760, N. D. N. Y.); *Allen* v. *United States*, 148 F. Supp. 817 (S. D. Ill.). The only district court decision which concluded that there was jurisdiction, and which was explicitly followed by the court below in the present case, is *Miller* v. *United States*, 124 F. Supp. 203 (W. D. Mo.), decided by Mr. Justice Whittaker when he was a district judge. The *Miller*

2. *The Merits.* It was error, we believe, for the court below to reject the cited decisions of the four courts of appeals and the numerous district court decisions. The basic mistake of the decision is its refusal to recognize that courts have no jurisdiction over an action against the United States unless Congress has *explicitly* conferred jurisdiction on the courts over that particular type of action. We show below that there is nothing in the 1951 Act which confers such jurisdiction. Moreover, an earlier statute, dealing expressly with Veterans Administration decisions, codifies the Government's traditional immunity from suits of the type here involved.

It is, of course, a fundamental principle that the United States cannot be sued without its consent. It is equally well settled that a waiver of sovereign immunity takes effect only where Congress has *expressly* and *unequivocally* consented to such suit. *Dalehite* v. *United States*, 346 U.S. 15, 30, 31; *Feres* v. *United States*, 340 U.S. 135, 139; *United States* v. *Sherwood*, 312 U.S. 584, 587, 590; *United States* v. *Shaw*, 309 U.S. 495, 500-501; *Munro* v. *United States*, 303 U.S. 36, 41. "[S]uch consent" by Congress, as underscored by Chief Judge Hutcheson in ruling that the courts have no jurisdiction to entertain suits under the 1951 Servicemen's Indemnity Act, "must be expressed and not implied." *Acker* v. *United States, supra*, at p. 578.

It cannot be challenged that there is no express or explicit congressional provision consenting to suit

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case was not appealed to the Court of Appeals for the Eighth Circuit. The Eighth Circuit, in an opinion which is not cited in the decision below, later ruled that the courts lack jurisdiction to review death gratuity denials under the 1951 Act. *Turner* v. *United States, supra.*

against the United States under the 1951 Act. On its face, the Act contains no express waiver of immunity and rebuts any inference that suit will lie against the United States to recover the gratuitous indemnity therein provided. As already noted, it is not lightly to be assumed or inferred that the Government has given consent to be sued. What must be shown "to give jurisdiction" is explicit congressional consent to "clear relinquishment of sovereign immunity." *Dalehite* v. *United States*, *supra*, at p. 31; *United States* v. *Sherwood*, *supra*, at p. 590. A reading of each of the nine sections comprising the 1951 Act (*infra*, pp. 17-22) shows that nothing in the Act suggests a congressional purpose to allow suits to review the administrative determination of gratuity claims. Indeed, the court below in the present case seems to acknowledge that Congress has failed to make an express provision authorizing such suits, and finds consent only through implication.[6] Such a result is at war with the settled doctrine that federal consent to suit must be expressed and not implied.

The Second Circuit seems to suggest that Section 11 of the Act of October 17, 1940, 54 Stat. 1197, 38 U.S.C. 11a-2, together with its express exceptions, provides a jurisdictional basis for death gratuity actions. But examination of the terms of Section 11 discloses that that statute actually reinforces the need for holding that there is no such jurisdiction. Section 11, in denying judicial review of Veterans Administration claims, states:

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[6] Thus, the court seeks to overcome the effect of the failure on the part of Congress to make express provision for suit by describing the omission as a "failure expressly to state the obvious" (App. B, *infra*, p. 25).

> Notwithstanding any other provision of law, except as provided in section 19 of the World War Veterans' Act, 1924, as amended, and in section 817 [617] of the National Service Life Insurance Act of 1940,[7] the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.[8]

Thus, judicial review of Veterans Administration determinations may be had only where provided by (1) Section 19 of the 1924 Act (38 U.S.C. 445), and (2) Section 617 of the N.S.L.I. Act of 1940 (38 U.S.C. 817).[9]

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[7] Although the text of Section 11 refers to Section 817 of the N.S.L.I. Act of 1940, Section 11 must be deemed to relate to Section 617 of the N.S.L.I. Act of 1940 since that Act has no Section 817. Presumably, the reference is to the United States Code citation for Section 617, *i.e.*, 38 U.S.C. 817.

[8] To the same effect, see Section 5 of the Act of March 20, 1933, 48 Stat. 9, 38 U.S.C. 705: "All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

[9] It is important to note that these are the only two classes of Veterans Administration claims reviewable in the courts, and that at no time—either upon enactment of the 1951 Act or subsequent thereto—has Section 11 of the 1940 Act been amended so as to give the courts jurisdiction over any other or additional type of Veterans Administration claim.

Neither of these two provisions applies here. Section 19 provides for judicial review of determinations concerning "yearly renewable term insurance" and "United States Government life (converted) insurance" under "a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder * * * ." Section 19, 43 Stat. 612, as amended; 38 U.S.C. 445. This judicial review provision is inapplicable here because the instant claim is not one for term insurance, but rather is for the death gratuity available under the 1951 Act. This consideration, standing by itself, is, we believe, sufficient to show that the reliance of the court below on Section 19 (38 U.S.C. 445) is misplaced.

Moreover, Section 19 is inapplicable for the added reason that the instant claim, as has been noted with respect to similar veterans' claims, "arises, not out of contract, but from a statute." *Morgan* v. *United States*, 115 F. 2d 426, 427 (C.A. 5). That the 1951 Act did not contemplate a "contract of insurance," but rather a gratuitous indemnity, is clear from the language of the Act. Its preamble emphasizes that it authorizes the payment "by the Administrator of Veterans' Affairs" not of the proceeds of a contract or policy of insurance but "of a gratuitous indemnity to survivors of members of the Armed Forces who die in active service." Appendix A, *infra*, p. 17. And in sharp contrast to the World War Veterans' Act, 1924 (authorizing the United States Government life insurance contracts) and the N.S.L.I. Act of 1940 (authorizing insurance contracts for World War II servicemen), the terms of the 1951 Act make no provision for applications for policies of insurance, for premium payments, for the use of

Tables of Mortality, for the issuance of policies of insurance, or for dividend payments and refunds of unearned premiums. Further, unlike the earlier Acts, no provision is made for the creation of a trust fund in the Treasury. Payments under the 1951 Act are made directly "out of any money in the Treasury not otherwise appropriated." (Sec. 7, 65 Stat. 35, *infra*, p. 21.) Finally, while the earlier Acts expressly use the significant terms "*contract* of insurance" and "*policy* of insurance" (see, *e.g.*, 38 U.S.C. 518, 802(f)), the 1951 Act deliberately avoids such contractual terms and employs instead the term "automatic indemnity coverage" or "automatically insured" in juxtaposition with "*contract* of national service life insurance or United States Government life insurance." (Secs. 2, 5, 65 Stat. 34-35, emphasis added, *infra*, pp. 20-21.)[10]

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[10] The legislative history of H.R. 1, 82d Cong., 1st Sess., which was enacted into law as the 1951 Act, shows full congressional awareness of the gratuitous and non-contractual nature of the indemnity made available thereunder.

The bill's sponsors repeatedly referred to it as providing a gratuitous indemnity, and pointed out that no policies of insurance would be issued. See 97 Cong. Rec. 618, 620, 621, 628, 629, 631; H. Rep. No. 6, 82d Cong., 1st Sess., p. 10. When it was being considered on the floor of the Senate, Senator Taft, contrasting it with the contractual arrangement theretofore existing under the National Service Life Insurance program, noted that "H.R. 1 * * * represents a complete revolution in the entire national life insurance program" in providing the servicemen with free insurance. 97 Cong. Rec. 1517.

In addition, in the hearings on the bill, Congressman Davis noted that it:

> represents a completely new approach, and I think it should be understood from the start that this is not a continuation of insurance. This is an indemnity program as contrasted to the premium-paying type of insurance * * *. [Hearings before

Consistent rulings by the Veterans Administration point out that "It is a fact, however, that the Service-

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Senate Finance Committee on "Servicemen's Gratuitous Insurance," S. 84, S. 304, S. 506, S. 654, and H.R. 1; 82d Cong., 1st Sess., January 25, 1951, p. 35.]

Another witness at the same hearing, stressing the non-contractual nature of the gratuitous indemnity proposed by the Act, pointed out that "Those who have misgivings in reference to the gratuitous indemnity proposals point out that it would not be contractual and hence over a period of years might lack stability." P. 78, *id.* Still further manifestation of the gratuitous and non-contractual nature of the indemnity and the need for according finality to administrative determinations with respect to such gratuitous indemnities is apparent from the following colloquy, reprinted at pages 87-88 of the Senate Hearings on "Servicemen's Gratuitous Insurance":

> Mr. DORSEY. Is there not another advantage, Mr. Breining? Under the present law [*i.e.*, 1924 Acts (U.S. Government Life Insurance) and the 1940 Act (N.S.L.I.)] each policy holder has a contract and not even the Congress or anyone else can violate that contract; it is guaranteed. However, if it were on a gratuitous basis, the Congress could from time to time revise what they would give either upward or downward under certain circumstances, and the decision of the Administrator could be final. Is that correct?
>
> Mr. BREINING. I think from a legal standpoint, to which I think the counsel was addressing himself, undoubtedly if it were in the form of a gratuity Congress could do anything it wished with it. Congress would then maintain complete control at all times over the situation, and from a legal standpoint I think it would be absolutely sound.
>
> As a matter of fact, in the so-called economy bill of 1933 that very thing was done, and although the repeal of war-risk insurance was challenged in the courts, and the Supreme Court in the Lynch-Wilmer decision did set aside the legislation, there was no challenge, no question that Congress as far as the gratuity is concerned can give it or withdraw it.
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> * * * * *
>
> Mr. BREINING. I really think this is a matter of policy. It is whether or not the Congress wants to have an insurance program or whether they want to give a gratuity.

men's Indemnity Act [of 1951] provides a gratuitous—as distinguished from a contractual—benefit" and that the "indemnity [under the 1951 Act] is a gratuity, not contract, payment." Administrator's Decision, Veterans Administration, No. 952, February 7, 1955, p.1; Administrator's Decision, Veterans Administration, No. 953, March 14, 1955, p. 4, fn. 4.

Accordingly, since there is no "contract of insurance" under the 1951 Act, the conditions precedent to suit under Section 19 of the World War Veterans' Act, 1924 (38 U.S.C. 445) were not, and could not be, met in this proceeding. No different conclusion is called for by *United States* v. *Jackson*, 302 U.S. 628, and the related lower court cases relied upon below (App. B, *infra*, p. 24). *Jackson* involved an insurance arrangement entirely different from the gratuitous indemnity available under the 1951 Act. In that case, Congress had declared that where the serviceman was killed within a short period of time after his induction into the service, and therefore had no opportunity to apply for the regular policy or contract of insurance, he "shall be deemed to have applied for and to have been granted" a regular contract of insurance. Thus, the serviceman involved in the *Jackson* case was deemed to have been issued as valid a contract of insurance as any other serviceman who in fact did avail himself of the opportunity to buy a regular life insurance contract or policy. But, no such contracts or policies are available to anyone under the 1951 Act. It is true that if Congress had provided that a serviceman coming within the protection of the 1951 Act "shall be deemed to have applied for and to have been granted" a regular contract of National Service Life Insurance or United States

Government life insurance, the *Jackson* case would be in point and the argument of the court below that the 1951 Act gave rise to a contract of insurance would have force.[11] Indeed, it was proposed early in the consideration of H.R. 1, 82d Cong., 1st Sess.—the bill which later became the 1951 Act—to issue insurance on such a basis. Senator George, the Chairman of the Finance Committee, considering H.R. 1, proposed that instead of issuing automatic and gratuitous indemnity, the serviceman "shall be deemed to have applied for and to have been granted national service life insurance in the amount of $10,000 * * *." 97 Cong. Rec. 1515-1516; Hearings before Senate Committee on Finance on "Servicemen's Gratuitous Insurance," S. 84, S. 304, S. 506, S. 654, and H.R. 1, 82d Cong., 1st Sess., January 25, 1951, p. 1. But Senator George's substitute bill, S. 84, was abandoned in favor of H.R. 1, which contained no such language and under which the insurance, as we have noted, was issued as a complete gratuity.

Section 19 of the 1924 Act (38 U.S.C. 445), therefore, does not furnish a basis for judicial review of a denial of a 1951 Act death gratuity. Nor, for similar reasons, may such review be predicated on the only other statutory provision conferring jurisdiction in Veterans Administration cases, *i.e.*, Section 617 of the 1940 N.S.L.I. Act (38 U.S.C. 817). Section 617

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[11] Even if there was a contract, there would still have to be specific statutory authority conferring jurisdiction before a court could entertain suit. It is settled that the United States may create rights in individuals against itself without providing a remedy in the courts. *United States* v. *Babcock*, 250 U.S. 328, 331; *Tutun* v. *United States*, 270 U.S. 568, 576; *Lynch* v. *United States*, 292 U.S. 571, 582; *Stark* v. *Wickard*, 321 U.S. 288, 306; *Lichter* v. *United States*, 334 U.S. 742.

authorizes suit on N.S.L.I. policies by expressly incorporating the jurisdictional provisions of Section 19. Section 617, as amended in 1946 (60 Stat. 788), provides:

> In the event of disagreement as to any claim arising under this Act, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 19 and 500 of the World War Veterans' Act, 1924, as amended.[12]

This express incorporation of Section 19's "conditions and limitations" means, of course, that the court's jurisdiction under Section 617 depends on the existence of a "contract of insurance." But, as has been shown, there can be no such contract under the 1951 Act. Moreover, Section 617 confers jurisdiction only with respect to "any claim arising under this Act," *i.e.*, the National Service Life Insurance Act.

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[12] As originally enacted (54 Stat. 1014), Section 617 read as follows:

> In the event of a disagreement as to claim arising under this *part*, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 19 and 500 of the World War Veterans' Act, 1924, as amended: *Provided*, That in any such suit the decision of the Administrator as to waiver or non-waiver of premiums under section 602(n) shall be conclusive and binding on the court. [Former emphasis supplied.]

The 1946 Amendment eliminated the proviso relating to waiver of premiums and substituted the word "Act" for the word "part." The original choice of the word "part" arises from the fact that the N.S.L.I. Act of 1940 was Part I of Title VI of the Second Revenue Act of 1940, 54 Stat. 974.

It does not, therefore, confer jurisdiction with respect to the instant claim based on the 1951 Act.

While Section 19 of the 1924 Act and Section 617 of the N.S.L.I. Act do contain express waivers of sovereign immunity, and also establish a detailed procedure for litigation under those Acts, neither of the two Acts authorizes jurisdiction over the instant claim under the 1951 Act. It follows, in view of the two earlier enactments, that Congress knew how to grant consent to suit had it intended to so provide in the 1951 Act. The absence of any such provision compels the conclusion that Congress had no such intention.

3. *Importance.* We recognize that the importance of the question presented has been lessened to an extent by the repeal of the 1951 Act as of January 1, 1957. Servicemen's and Veterans' Survivors Benefits Act, P.L. 881, 84th Cong., 2d Sess., 70 Stat. 886, 38 U.S.C. (Supp. IV) 1116(e). Under the repealing statute, the 1951 Act will not apply in the case of any serviceman dying after January 1, 1957. However, the question presented will still be of substantial importance. The Veterans Administration has advised us that over 5,200 death gratuity claims were administratively denied under the 1951 Act, and that there are 360 such claims now pending administratively. We submit that this body of potential litigation, and the likelihood of the rights of the claimants varying from circuit to circuit if the decision below is allowed to stand, warrants review of that decision by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JULY 1957

APPENDIX A

P.L. 23, 82d Cong., 1st Sess. (65 Stat. 33), Part I of which constituted the Servicemen's Indemnity Act of 1951 (65 Stat. 33, 38 U.S.C. 851-858), provides in pertinent part as follows:[13]

Public Law 23—82d Congress
Chapter 39—1st Session
H. R. 1.

AN ACT

To authorize the payment by the Administrator of Veterans' Affairs of a gratuitous indemnity to survivors of members of the Armed Forces who die in active service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PART I—SERVICEMEN'S INDEMNITY

SEC. 1. This part may be cited as the "Servicemen's Indemnity Act of 1951."

SEC. 2. Except as hereinafter provided, on and after June 27, 1950, any person in the active service of the Army, Navy, Air Force, Marine Corps, Coast Guard, or the Reserve components thereof, including the National Guard when called or ordered to active duty or active training duty for fourteen days or more; cadets and midshipmen at the United States Military, Naval and Coast Guard Academies; commissioned officers of the Public Health Service while entitled to full military benefits as provided in section 212(a) of the Act of July 1, 1944 (58 Stat. 689), as amended

[13] See footnote 1, page 2.

(42 U.S.C. 213); and commissioned officers of the Coast and Geodetic Survey while assigned to duty during a period of war or an emergency as proclaimed by the President or the Congress on projects for the Army, Navy, or Air Force in areas outside the continental United States or in Alaska or in coastal areas of the United States determined by the Department of Defense to be of immediate military hazard, shall be automatically insured by the United States, without cost to such person, against death in such service in the principal amount of $10,000: *Provided,* That any person called to extended active service for a period exceeding thirty days shall continue to be so protected for a period of one hundred and twenty days after separation or release from such active service: *Provided further,* That persons in the Reserve components, including the National Guard, while engaged in aerial flights in Government owned or leased aircraft for any period, with or without pay, as an incident to their military or naval training, shall be deemed to be in the active service for the purposes of this Act: *And provided further,* That for the purposes of this part, any person, who, on or after June 27, 1950, was or shall be provisionally accepted and directed or ordered to report to a place for final acceptance or for entry upon active duty in the military or naval service and who died or shall die as the result of disability incurred while en route to such place and within one hundred and twenty days after the incurrence of such disability, or any registrant under the Selective Service Act of 1948, as amended, who on or after June 27, 1950, in response to an order to report for induction into the Armed Forces and who, after reporting to a local draft board, died or dies as the result of disability incurred while en route from such draft board to a designated induction

station and within one hundred and twenty days after the incurrence of such disability shall be deemed to have died in active service.

SEC. 3. Upon certification by the Secretary of the service department concerned of the death of any person deemed to have been automatically insured under this part, the Administrator of Veterans' Affairs shall cause the indemnity to be paid as provided in section 4 only to the surviving spouse, child or children (including a stepchild, adopted child, or an illegitimate child if the latter was designated as beneficiary by the insured), parent (including a stepparent, parent by adoption, or person who stood in loco parentis to the insured at any time prior to entry into the active service for a period of not less than one year), brother, or sister of the insured, including those of the half-blood and those through adoption. The insured shall have the right to designate the beneficiary or beneficiaries of the indemnity within the classes herein provided; to designate the proportion of the principal amount to be paid to each; and to change the beneficiary or beneficiaries without the consent thereof but only within the classes herein provided. If the designated beneficiary or beneficiaries do not survive the insured, or if none has been designated, the Administrator shall make payment of the indemnity to the first eligible class of beneficiaries according to the order set forth above, and in equal shares if the class is composed of more than one person. Unless designated otherwise by the insured, the term "parent" shall include only the mother and father who last bore that relationship to the insured.

Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary,

if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided*, That no payment shall be made to the estate of any deceased person.

SEC. 4. The indemnity shall be payable in equal monthly installments of one hundred and twenty in number with interest at the rate of 2¼ per centum per annum.

SEC. 5. The automatic indemnity coverage authorized by section 2 shall apply to any person in the active service of the named Armed Forces who, upon death in such active service, or within one hundred and twenty days after separation or release from such active service as prescribed in section 2, is insured against such death under a contract of national service life insurance or United States Government life insurance, but only with respect to a principal amount of indemnity equal to the difference between the amount of insurance in force at the time of death and $10,000. Any person in active service, who is insured under a permanent plan of national service life insurance or United States Government life insurance, may elect to surrender such contract for its cash value. In any such case the person, upon application in writing made within one hundred and twenty days after separation from active service, may be granted, without medical examination, permanent plan insurance on the same plan not in excess of the amount surrendered for cash, or may reinstate such surrendered insurance upon payment of the required reserve and the premium for the current month. Any person in the active service having United States Government life insurance or national service life insurance on the five-year level premium term plan, the term of which expires while such person is in active service after

the date of this enactment, shall, upon application made within one hundred and twenty days after separation from service, payment of premiums and evidence of good health satisfactory to the Administrator, be granted an equivalent amount of insurance on the five-year level premium term plan at the premium rate for his then attained age. Waiver of premiums under the National Service Life Insurance Act of 1940, as amended, shall not be denied in any case of issue or reinstatement of insurance on a permanent plan under this section in which it is shown to the satisfaction of the Administrator that total disability of the applicant commenced prior to the date of his application.

SEC. 6. The Administrator of Veterans' Affairs is authorized to promulgate such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes.

SEC. 7. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this part, to be known as the servicemen's indemnity appropriation, for the payment of liabilities under this part.

SEC. 8. Any person guilty of mutiny, treason, spying, or desertion, or who, because of conscientious objections refuses to perform services in the land or naval forces of the United States or refuses to wear the uniform of such force, shall forfeit all rights to an indemnity under this Act: *Provided,* That restoration to active duty after commission of any such offense shall restore all rights to an indemnity under this Act. No indemnity shall be payable for death inflicted as

a lawful punishment for crime or for military or naval offense, except when inflicted by an enemy of the United States.

SEC. 9. The provisions of Public Law Numbered 262, Seventy-fourth Congress, approved August 12, 1935 (49 Stat. 607), as amended, titles II and III of Public Law Numbered 844, Seventy-fourth Congress, approved June 29, 1936 (49 Stat. 2034), as amended, and section 15 of Public Law Numbered 2, Seventy-third Congress, March 20, 1933, insofar as they are applicable, shall apply to the provisions of this part: *Provided,* That assignments of all or any part of the beneficiary's interest may be made by a beneficiary to any other person or persons within the permitted class of beneficiaries, as specified in section 3, if all other persons having contingent rights of equal or greater priority to those of the assignee join in the assignment: *Provided further,* That such assignment shall not affect any payments made prior to its receipt by the Veterans' Administration.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 175 — October Term, 1956.

(Argued February 6, 1957 Decided April 1, 1957.)

Docket No. 24024

MADELINE WILKINSON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Before: CLARK, *Chief Judge*, MEDINA, *Circuit Judge*, and SMITH, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, *Judge*.

Madeline Wilkinson, widow of a serviceman killed in action in Korea, appeals from an order dismissing for lack of jurisdiction her action to recover indemnity insurance on the death of her husband, brought after the Administrator of Veterans' Affairs had ruled that the soldier's mother was the proper beneficiary. Reversed and remanded.

BENJAMIN E. KANTROWITZ, New York City, *for plaintiff-appellant*.

MIRIAM R. GOLDMAN, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for defendant-appellee*.

CLARK, *Chief Judge*:

The widow of a soldier killed in Korea appeals from a district court order dismissing her action for

the proceeds of her husband's Government insurance on the ground that the courts lack jurisdiction to review the Veterans' Administration decision that the soldier's mother was the true beneficiary. Judicial review is precluded by 38 U. S. C. § 11a-2 unless the automatic free insurance provided the deceased by the Servicemen's Indemnity Act of 1951, 65 Stat. 33, 38 U. S. C. § 851, created a "contract of insurance" in the meaning of 38 U. S. C. § 445.[14] The trial court held, following a line of precedents cited below, that such indemnity "gratuitously provided" for servicemen did not come within the terms of the review permitted under the latter Act.

The cases are consistent in holding that the free automatic insurance provided World War I fighting men by the War Risk Insurance Act, 40 Stat. 409, constituted a "contract of insurance" within 38 U. S. C. § 445, *e.g.*, *United States* v. *Jackson*, 302 U. S. 628; *Caprio* v. *United States*, 1 Cir., 45 F. 2d 520; *United States* v. *Campbell*, 4 Cir. 139 F. 2d 424; *United States* v. *Carlson*, 9 Cir., 44 F. 2d 5; *Cunningham* v. *United States*, 5 Cir., 67 F. 2d 714; *Morgan* v. *United States*, 5 Cir., 115 F. 2d 427; *United States* v. *Kerr*, 9 Cir., 61 F. 2d 800; *United States* v. *Preece*, 10 Cir., 85 F. 2d 952, certiorari denied *Preece* v. *United States*, 300 U. S. 660. We think the difference in wording between that statute and the present one is not sufficient to warrant a different result.

Nor do we find it significant that Congress expressly provided for judicial review in the National Service

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[14] 38 U.S.C. § 445 allows review of a "disagreement as to claim * * * under a contract of insurance between the Veterans' Administration and any person **or** persons claiming thereunder * * *." This statute, originally enacted as § 19 of the World War Veterans' Act of 1924, 43 Stat. § 612, is expressly excepted from the provisions of 38 U.S.C. § 11a—2—enacted Oct. 17, 1940, 54 Stat. 1197—forbidding judicial review of decisions by the Administrator of Veterans' Affairs on claims for benefits or payments.

Life Insurance Act of 1940, 38 U. S. C. § 817, and failed to make similar provisions in the 1951 Act. At the time the latter statute was passed disputes similar to the present one under various servicemen's insurance statutes were all committed to the courts by either 38 U. S. C. § 445 or 38 U. S. C. § 817; and servicemen's families had long litigated such claims. In all probability the failure to mention judicial review here was because the Congress assumed that claims under the new statute were reviewable as "contracts of insurance" within 38 U. S. C. § 445. The 1951 Act amounted to little more than a mandate for payment by the Government of the premiums on what every serviceman was already strongly urged to carry, viz., $10,000 of cheap Government term insurance; and it was not considered a measure to transform Government insurance into a gratuity or to narrow the scope of review of the Veterans' Administration in this area.

We cannot interpret the limitations on judicial review set in 38 U. S. C. § 11a-2 differently here from cases where the sole beneficiary sues the Government, and where Congress must have intended some court review of arbitrary agency behavior. The cases which deny review rest on inferences as to congressional intent drawn from the ambiguous legislative history of the 1951 Act and from its failure expressly to state the obvious.[15] The Supreme Court, in construing

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[15] *Ford* v. *United States*, 5 Cir., 230 F. 2d 533; *Acker* v. *United States*, 5 Cir., 226 F. 2d 575; *Cyrus* v. *United States*, 1 Cir., 226 F. 2d 416; *United States* v. *Houston*, 6 Cir., 216 F. 2d 440; *Bishop* v. *United States*, D.C. W.D. Mo., 135 F. Supp. 647; *Brewer* v. *United States*, D.C. E.D. Tenn., 117 F. Supp. 842; *Declet* v. *Veterans Administration*, D.C. D.P.R., 129 F. Supp. 566. Most of these cases only cite authority, and none treat all the facts and arguments presented to us. To the contrary is *Miller* v. *United States*, D.C. W.D. Mo., 124 F. Supp. 203, quoted by us *infra* and followed in our decision herein.

World War I insurance legislation, was unwilling to find a tacit congressional intent to convert automatic insurance into a mere gratuity, *United States* v. *Jackson, supra*, 302 U. S. 628; and we are similarly unwilling to break the expectations of the families of the men who failed to buy commercial policies in reliance on the Government's insurance. The 1951 statute created a "contract of insurance" as much as such a relationship is possible between the Government and the men whom it can compel to serve.

We agree with the forceful and persuasive opinion of Judge, now Mr. Justice, Whittaker in *Miller* v. *United States*, D. C. W. D. Mo., 124 F. Supp. 203, 204-205: "Servicemen who lose their lives in the service of our country, and the families of those men, are not the discretionary cestuis of a beneficent Veterans Administration, but, rather, are the beneficiaries of a grateful America * * *." We shall follow it.

Reversed and remanded.

Judgment of the Court of Appeals

[Caption omitted]

(Filed April 1, 1957)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this court.

☆ U. S. GOVERNMENT PRINTING OFFICE:1957—432214/P.O. 18